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## Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger

Philip P. Frickey<sup>†</sup>

To my children, eleven minutes are an eternity. To their middle-aged father, eleven years are an evanescence. Eleven years ago I lost my colleague, Irving Younger, after a valiant fight with cancer. Irving was only fifty-five at his death—almost eleven years older than I am now, when I am honored to become the Irving Younger Professor of Law.

Irving had filled the three decades in the law that fate allowed him by living life in the law to the fullest: he had been a private practitioner, a federal prosecutor, and a state court trial judge, as well as a law professor. He taught at the University of Minnesota Law School from 1984 to about a week before his death in March 1988. It is extraordinary how in this brief period he so engaged our students. Our mutual students waxed poetic to me—and these are young adults from the upper Midwest, mind you—about their sense of awe and deep appreciation for the magic that he conjured up and made into law every day, *just for them*. For him, law—his law, anyway—was performance art, even though our catalog just called it “Evidence” and “Civil Procedure.” In the final few classes he taught, he broke all personal pedagogical precedents, abandoning the animated, erect posture that was his signature and remaining seated while speaking. He apologized to the students by saying simply that he was unable to do it any other way. After he passed away, his presence lived on in those students, who wanted to commemorate for future generations

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<sup>†</sup> Irving Younger Professor of Law, University of Minnesota. This essay is a slightly revised and lightly footnoted version of a lecture given on March 3, 1999 to inaugurate the Irving Younger Professorship at the University of Minnesota Law School. I appreciate the indulgence of the *Minnesota Law Review* in publishing the lecture largely as I gave it and in waiving the usual requirement of copious footnoting of all propositions.

their sense of the man and his legacy. In the lobby of our law school is a memorial plaque and display honoring Irving.

As Jon Waltz has written, "[a]bove all, [Irving] was a consummate teacher of both the experienced and the inexperienced."<sup>1</sup> Long before his untimely demise, Irving had established himself as the foremost lecturer on advocacy, evidence, and trial practice in the United States. Louise Weinberg, a long-time friend, summed up the "public Irving" by writing that "his real *métier* was the lecture-hall. Dickens's American tours, Dickens's amazing lectures, were deep in his consciousness; and here was something he could do so superbly he could satisfy even himself."<sup>2</sup> Unlike Dickens, Irving lived in the age of videotape. The man is gone, but his lectures on such topics as what really happened in *Erie Railroad Co. v. Tompkins*<sup>3</sup> live on in dozens of law libraries. In a very real sense, his legacy reflects his public persona—it is magnetic.

Seven years ago I delivered a lecture inaugurating the Faegre & Benson professorship, which I was pleased to be awarded at that time. Entitled *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, it was later published as an essay by the *Minnesota Law Review*.<sup>4</sup> In thinking about Irving for this lecture, I recalled how I prepared that lecture *as a lecture*, and then later modified it for publication. The best way to inaugurate a chair honoring Irving, I think, is with a real lecture—not something written as an essay, read in serious style, and later printed verbatim in a law review. That was not Irving's style, nor should it be the style of a *lecturer*—one who respects an audience of persons willing to part with their precious time to hear commentary. What follows is a lecture in honor of a great lecturer.

In that light, I was reminded of a great lecturer of the last century who is known today only for the essays derived from those lectures. Ralph Waldo Emerson knew how to engage an audience. Consider, for example, the first sentence of one of his lectures: "There are some subjects which have a kind of prescriptive right to dull treatment."<sup>5</sup> The rest of the first para-

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1. Jon R. Waltz, *Irving Younger*, 73 MINN. L. REV. 819, 820 (1989).

2. Louise Weinberg, *Irving Younger*, 73 MINN. L. REV. 823, 824 (1989).

3. 304 U.S. 64 (1938).

4. Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992).

5. Ralph Waldo Emerson, *Politics*, in 3 THE EARLY LECTURES OF RALPH WALDO EMERSON 238, 238 (Robert E. Spiller & Wallace E. Williams eds.,

graph of the lecture contends that "[a] sprightly book" on certain subjects "would be presumptuous" because the subjects are so stuffy that the social institutions associated with them "require[] of all comers sleepy manners, half-shut or whole-shut eyes, and the rigorous exclusion of all wit."<sup>6</sup> Emerson wondered how books on such subjects "found readers among mere mortals who must sometimes laugh and are liable to the infirmity of sleep."<sup>7</sup>

Believe it or not, in talking about how some subjects have a prescriptive right to dull treatment, Emerson was *not* addressing statutory interpretation. His topic was *politics*! Obviously, Emerson did not anticipate the Presidency of Bill Clinton. But had someone asked Emerson how to attribute meaning to a statute, I have little doubt that he would have applied his notion of a prescriptive right to dull treatment to the topic. For Emerson, who had abandoned the clergy to pursue his own brand of philosophy, something like inspired intuition, and definitely nothing like textual interpretation of holy passages, captured the path by which each person might attain an original relationship with the universe—a transcendency beyond the diversity that our senses indicate to the unifying reality lying beyond.

In fact, for many years the legal community considered statutory interpretation unworthy even of Emerson's prescriptive right to dull treatment. In 1983, Robert Weisberg observed that "[t]he general contemporary American view of statutory interpretation is that there is not a great deal to say about the subject. As a result, nothing else as important in the law receives so little attention."<sup>8</sup> As legal scholarship had all but ignored the question of statutory interpretation from the late 1950s to the early 1980s, the Supreme Court confidently intoned that "the sole task"<sup>9</sup> of the judiciary in statutory interpretation is to determine congressional intent.<sup>10</sup> But both the silence of the academy and the conventional wisdom of the

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1972).

6. *Id.* at 238-39.

7. *Id.* at 239.

8. Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 213 (1983) (footnote omitted).

9. *Commissioner v. Engle*, 464 U.S. 206, 214 (1984).

10. In fact, though, the thorough practitioner could find cases purporting to stick with plain statutory textual meaning and other cases that relied upon the "spirit" or purpose of the statute. See Frickey, *supra* note 4, at 243.

bench and bar ignored the deep problems that had long been revealed with a sole reliance upon legislative intent.<sup>11</sup> Critics had quarreled over whether legislative intent even existed—at the federal level, how can 535 people in Congress have any discernible intent? Moreover, even if legislative intent exists, why should it control statutory meaning?

Statutory meaning is pushed in at least two directions other than original legislative intent. First, the words of the statute may seem to have a clear meaning all by themselves. If that fails to coincide with evidence of legislative intent, such as the published legislative history, then which of these is to be privileged in defining statutory meaning? Second, the context under examination may provide strong reasons for lawyers to prefer one statutory meaning to another. One meaning may be more functional, or more consistent with the broader legal landscape, or simply more in accord with common sense. If the interpretation consistent with apparent legislative intent produces a dysfunctional or absurd outcome, must that interpretation be privileged as against these more practical concerns?

In my earlier lecture, I noted that a major refocusing on the subject was beginning to occur by the mid-1980s.<sup>12</sup> In the academy, Guido Calabresi's book, *A Common Law for the Age of Statutes*, published in 1982, was the most prominent example.<sup>13</sup> Although Calabresi dealt mainly with the problem of outdated statutes rather than with the methodology of statutory interpretation, he did focus attention on the role of statutes in the broader legal landscape. The major shift, though, was brought about by three excellent legal minds who bridged the academy and the bench. After Richard Posner,<sup>14</sup> Frank Easterbrook,<sup>15</sup> and Antonin Scalia<sup>16</sup> were appointed to federal appellate judgeships and, in Scalia's case, eventually to the Supreme Court, their various reconsiderations of the conventional wisdom concerning statutory interpretation opened up a new debate.

In the main, and here I turn to events arising since my lecture seven years ago, Scalia's writings, primarily as a Supreme Court Justice in his opinions, have had the most long-term im-

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11. See, e.g., Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869-73 (1930).

12. See Frickey, *supra* note 4, at 244-56.

13. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

14. See Frickey, *supra* note 4, at 250-52.

15. See *id.* at 252-54.

16. See *id.* at 254-56.

pact. At this point, some personal and professional confessions are probably in order. Although I have taken issue with much of his analysis, I must confess that Scalia has been a godsend to my career. In the mid-1980s, my colleague Bill Eskridge and I were preparing a new casebook on legislation, with a primary focus on statutory interpretation.<sup>17</sup> We had undertaken this project in large part because, as young Washington lawyers, we had found that we had not been well prepared by our respective legal educations for what most attorneys actually do most of the time: interpret statutes and administrative rules that purport to govern the conduct of their clients in the modern regulatory state. We wanted to create teaching materials to fill what we perceived to be a serious gap in legal pedagogy. But, being young and ambitious and rather full of ourselves, we wanted the materials to be *very* scholarly as well.

As I have aged in my position, I see now that what satisfies me is work that combines the scholarly and the pedagogical—that is to say, work that attempts to address both levels simultaneously, rather than seeing one as the dog wagging the tail of the other or, worse yet, the tail completely severed from the dog. This is no simple task. Justice Scalia has made the theoretical aspects of statutory interpretation vivid and relevant to everyone. A practitioner writing a Supreme Court brief who ignored Justice Scalia's attacks upon the conventional wisdom about statutory interpretation did so at her own peril. The practitioner in the lower federal courts was likely to encounter a fair number of judges who found Scalia's arguments persuasive, and a greater number who paid heed to them, if only to avoid being reversed. Practice in state courts has always been more in accord with Scalia's views. At the same time that the bench and bar were beginning to respond to Scalia's challenges, legal scholars recognized that the methodology of statutory interpretation is not only one of the most basic of jurisprudential questions, it is also one of the most challenging. Finally, it became obvious that law students needed a more comprehensive overview of statutory interpretation for its own sake, not simply as a skill one might pick up by osmosis through taking

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17. The book was published as WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1988). We produced a second edition in 1995. See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (2d ed. 1995). Elizabeth Garrett has joined us in beginning work on a third edition.

statutory courses such as taxation or bankruptcy. In short, Justice Scalia helped create a new cottage industry for me, for which I am eternally grateful.

When I gave the lecture seven years ago, it was clear what most of the elements of the new debate were. The old conventional wisdom—that legislative intent was the primary, if not the sole, basis for statutory interpretation—was under siege. Justice Scalia and his allies argued that legislative intent was nonexistent and, in any event, simply amounted to an unenacted preference, not enacted law.<sup>18</sup> This formalist attack argued that the only “law” was the law on the books—the text of the statute.<sup>19</sup> From this perspective, statutory interpretation should be governed by the ordinary meaning of the statutory text.

The old conventional wisdom was under attack from an antiformalist strain of legal thought as well. In a 1987 article, Bill Eskridge contended that, in many circumstances, the meaning of statutes has evolved over time—that statutory law, like constitutional law and common law, was inherently dynamic rather than static.<sup>20</sup> In 1990, Bill and I made the case for a pragmatic approach to defining and, in limited circumstances, redefining statutory meaning.<sup>21</sup> We argued descriptively—that courts had commonly considered textual meaning, legislative intent, and functional purposes that could be attributed to the statute, all measured against the concrete contexts of litigation<sup>22</sup>—and normatively as well—that this kind of critical pragmatism was appropriate because it sought to construct practical answers to concrete problems in light of the relevant textual, institutional, and contextual perspectives.<sup>23</sup>

This tension between formalism—what has been called Justice Scalia’s “new textualism”<sup>24</sup>—and antiformalism, amounting to a critical pragmatism, has matured since my lecture seven years ago. Justice Scalia recently gave us a splen-

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18. See Frickey, *supra* note 4, at 254-56.

19. See *id.*

20. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

21. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

22. See *id.* at 345-62.

23. See *id.* at 362-84.

24. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990).

did synopsis of his approach. In the Tanner Lectures he delivered at Princeton University,<sup>25</sup> Scalia criticized the antiformalist perspective as anti-democratic and too inattentive to the appropriate roles of legislatures and courts.<sup>26</sup> He continued his attack upon what he considers to be the myth of legislative intent in general and the usage of legislative history in statutory interpretation in particular.<sup>27</sup>

Justice Scalia's arguments have had some effect upon the Supreme Court. The Court is less likely to cite legislative history today,<sup>28</sup> and when it does, the citations seem less important to the outcome. The Court pays careful attention to statutory text and is much more likely than in earlier eras to use dictionaries to assist in constructing textual meaning.<sup>29</sup>

Now, it is important not to overstate the practical effects of the new textualism. As Thomas Merrill has pointed out, in the opinion-writing process, a Justice who is happy to consult legislative history might decide against using it to keep Justice Scalia and Justice Thomas, who shares Scalia's approach, on board with the majority result.<sup>30</sup> In cases where the votes are close, we are likely to see this kind of strategic opinion-drafting, especially because Scalia has the habit of refusing to join any part of a majority opinion that even cites legislative history. Indeed, he even boycotts portions of majority opinions that discuss why the legislative history cited by counsel should be given no weight.<sup>31</sup>

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25. See Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* xii, 3 (Amy Gutmann ed., 1997).

26. See *id.* at 9-14.

27. See *id.* at 16-18.

28. See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355-57 (1994).

29. See Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438 (1994).

30. See Merrill, *supra* note 28, at 365.

31. See, e.g., *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 n.† (1998) (noting that Justice Scalia joins in the entire opinion with the exception of a section that discusses and rejects a party's appeal to legislative history); *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 955 n.† (1997) (noting that Justice Scalia joins in the entire opinion with the exception of a footnote which discusses and rejects the use of legislative history in construing the statute at issue); *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in the judgment) (rejecting the portion of the majority opinion that discusses the legislative history of the statute at issue).



Under Justice Scalia's new formalism, while legislative history is out, the canons of statutory interpretation are back in.<sup>32</sup> In a dissenting opinion in 1991, he wrote:

I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies.<sup>33</sup>

Overall, the Rehnquist Court has been aggressive in creating new canons and recasting traditional canons, and Justice Scalia has gone along with this trend.<sup>34</sup>

But why? The canons are rules of thumb about statutory interpretation, and some of them are based on judicially identified policies. For example, statutes waiving sovereign immunity are narrowly construed, and ambiguities in criminal statutes are construed to the advantage of the criminal defendant. One would think that Justice Scalia would find such canons anti-democratic, for they are judicially created requirements that may dislodge an interpretation consistent with ordinary meaning. And in his Tanner Lectures, Justice Scalia says that "[t]o the honest textualist, all of these preferential rules and presumptions are a lot of trouble,"<sup>35</sup> in part because they "in-

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32. Respect for the canons had been in decline since Karl Llewellyn's famous essay suggested that for every canon there was a counter-canon. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950). About the time that Scalia lent support to canonical methodology, several scholars were suggesting various theories under which the canons play a legitimate role in statutory interpretation. See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1011 (1989) (observing that canons may represent "public values" drawn from the Constitution, statutes, and common law); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1183, 1191-225 (discussing how textual canons may be consistent with philosophical linguistics); David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 927-41 (1992) (arguing that canons promote legal stability); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 462-503 (1989) (arguing that canons should provide principles for interpreting statutes in post-New Deal regulatory circumstances). For a list of the canons used by the current Supreme Court, see William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 97-108 (1994).

33. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

34. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611-29 (1992).

35. Scalia, *supra* note 25, at 28.

crease the unpredictability, if not the arbitrariness, of judicial decisions."<sup>36</sup> As Bill Eskridge has remarked, this skeptical approach to the canons reflected in Justice Scalia's Tanner Lectures is inconsistent both with current Supreme Court practice and with Scalia's own practice as a Justice.<sup>37</sup>

The tension between Justice Scalia's scholarly quarrels with the canons and his judicial embrace of them may show that formalism has tensions buried within it that undermine the achievement of its goals. The basic premise of formalism is that predictability and certainty of law and the constraint of judicial discretion are what make law "law" and separate courts from legislatures and administrative agencies. If predictability and certainty are desired, one might get there through Justice Scalia's *judicial* pronouncement of a method for statutory interpretation—text plus canons. This is a very rule-like approach, and perhaps over time, once lower courts and the practicing bar get more familiar with its nuances, it could become fairly mechanical and thus predictable. I doubt it, but it is possible. In any event, note that this is formalism (top-down rule of law methodology) and not textualism, for canons can trump ordinary textual meaning. Does Justice Scalia want to be a textualist, or a text-plus-canons formalist? He said the former in his lectures and yet has joined, and even written, Supreme Court opinions that embrace the latter. If even those who follow such things have difficulty predicting how he will resolve this tension, it surely undercuts the goals of his crusade.

More generally, it is not clear that Scalia's effort has had a beneficial impact upon the practice of statutory interpretation. On the positive side, it has refocused attention on the text. I must agree that courts and attorneys were sometimes sloppy in their handling of ordinary textual meaning before the Scalia-led onslaught. It has also helped deflate implausible notions of legislative intent. But on the negative side, it is open to question whether the new attention to formalism has increased predictability and certainty. Of course, even if it has, it still might not be attractive normatively, because it may too easily ignore considerations of practicality and justice. If the new

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36. *Id.*

37. See William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1512 n.9, 1542-47 (1998).

formalism has not resulted in greater predictability and certainty, however, it has failed on its own terms.

There are reasons to doubt that the new formalism is the path to a new Jerusalem. A fundamental question is whether the lower courts have understood what is happening in a way that helps them conform their decision-making and opinion-writing practices to the new formalism. If the goals of the new formalism are predictability and certainty of law and limiting judicial discretion, it can only succeed if the method is comprehended by lower courts and practitioners. There are some startling counterexamples.

Perhaps the most vivid is *BFP v. Resolution Trust Corp.*<sup>38</sup> A provision of the Bankruptcy Code allows a trustee in bankruptcy to avoid a fraudulent transfer of property made within a year of the debtor's bankruptcy.<sup>39</sup> For our purposes, let us assume that all the trustee must establish is that the debtor was insolvent at the time of the transfer and that the debtor received "less than a reasonably equivalent value in exchange for such transfer."<sup>40</sup> The ordinary meaning of this language would seem to require the bankruptcy court to become a perpetual real estate appraisal agency. The process could often result in the invalidation of what were valid transfers of real property under state law, violating a cardinal principle of Anglo-American law—the certainty of land title.

The United States Court of Appeals for the Ninth Circuit in the *BFP* case saw the problem as a conflict between apparent statutory textual plain meaning, on the one hand, and common sense on the other, as well as an invasion of the state's local police power to determine the finality of land transfers.<sup>41</sup> The court of appeals acknowledged that the lower courts were divided: some had followed the apparent plain meaning of the provision and required bankruptcy judges to evaluate the legitimacy of all such property transactions; others had decided that if the transaction were valid under the state law concern-

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38. 511 U.S. 531 (1994). Other commentators have also subjected this opinion to withering critique. See, e.g., Edward S. Adams & Daniel A. Farber, *Beyond the Formalism Debate: Expert Reasoning, Fuzzy Logic, and Complex Statutes*, VAND. L. REV. (forthcoming Oct. 1999); Eskridge, *supra* note 37, at 1543-46, 1548, 1550, 1553.

39. See 11 U.S.C. § 548 (1994).

40. *Id.* § 548(a)(2)(A).

41. See *BFP v. Imperial Sav. & Loan (In re BFP)*, 974 F.2d 1144, 1148-49 (9th Cir. 1992), *aff'd sub nom. BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994).

ing fraudulent conveyances, it should be valid for federal bankruptcy purposes as well.<sup>42</sup> The court of appeals admitted that "a plain-language interpretation" would require constant bankruptcy court examination of property transactions and noted that equating state and federal fraudulent conveyance law might seem to create a judicial exception to the trustee's statutory avoiding powers.<sup>43</sup> The court also admitted that not allowing the trustee to second-guess such transactions might undermine the purpose of this code section, which is to recover lost equity.<sup>44</sup> The court of appeals called these arguments "persuasive" and the issue "a close one" but went the other way based on what it called "broader considerations."<sup>45</sup> The court of appeals was persuaded that, when the trustee interferes with past transactions, there is a strong possibility of a destabilizing effect on state mortgage transactions.<sup>46</sup> The court of appeals did not simply speculate on this point: it quoted scholarship condemning the "plain language" outcome because it arguably defeated the goals of both state law (because it will promote uncertainty as to the finality of foreclosure sales) and federal law ("because potential buyers will discount their assessment of the true market value of the property to reflect this uncertainty").<sup>47</sup>

The court of appeals engaged in the kind of critical pragmatic interpretation that is both more typical of courts and more useful for courts than is Justice Scalia's formalism. Although acknowledging a strong formalist argument to the contrary, the court of appeals found that this argument was outweighed by pragmatic and functional factors. Note that these were not merely considerations that the judges dreamed up, but factors that resonate well in the web of beliefs of the American legal community. Promoting the finality of property transactions, encouraging full bidding at foreclosure sales to obtain as much equity as possible for creditors, avoiding burying bankruptcy courts in endless litigation about valuation, and avoiding federal law deviating from state law on such sensitive issues are all factors well within the purview of judicial analysis. None seems idiosyncratic or unduly personal or ideological.

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42. *See id.*

43. *Id.* at 1148.

44. *See id.*

45. *Id.*

46. *See id.* at 1148-49.

47. *Id.*

In short, they are legal-process values that any American-trained lawyer should understand are relevant in our legal system.

To be sure, this does not ensure that this outcome is "right." "Right" here means the best accommodation of formalist and antiformalist factors, not, as for Justice Scalia, the "right" solution to a word puzzle. For example, it may be that a plain-language interpretation would have actually fostered greater equity for creditors without unduly burdening the bankruptcy courts and without unduly disconnecting state and federal law. It is precisely a debate of this type that critical pragmatic interpretation seeks to foster.

By a 5-4 vote, the Supreme Court affirmed the court of appeals.<sup>48</sup> The dissenting opinion chastised the majority for failing to follow the plain meaning of the statute.<sup>49</sup> Oddly, the *majority* opinion was written by Justice *Scalia*; the dissent was by Justice Souter. Recall that under the statute, the trustee may avoid the transaction if the debtor received "less than a reasonably equivalent value in exchange for such transfer."<sup>50</sup> To understand it the way *Scalia* did—to equate this text with whatever is provided by state fraudulent conveyance law, which varies in its details from state to state—seems a big stretch. Recall that the court of appeals acknowledged that the courts disagreeing with it (and with Justice *Scalia*) had the "plain meaning" argument on their side.<sup>51</sup>

Moreover, even if this language might be viewed as not one hundred percent unambiguous, that is not the key under *Scalia*'s self-announced test. Recall his formulation: "first, find the *ordinary* meaning of the language in its textual context; and second, using *established* canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies."<sup>52</sup> The first part of the test is *not* the old "plain meaning rule," a familiar notion to lawyers that if the statute has a plain meaning—is unambiguous—the court must stick with that meaning, but if the statute is ambiguous, the court is free to consult the legislative his-

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48. See *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994).

49. See *id.* at 549-55 (Souter, J., joined by Blackmun, Stevens & Ginsburg, JJ., dissenting).

50. 11 U.S.C. § 548(a)(2)(A) (1994).

51. See *supra* notes 42-45 and accompanying text.

52. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (*Scalia, J., dissenting*) (emphasis added).

tory, statutory purposes, and other potential sources of meaning.<sup>53</sup> Instead, Justice Scalia has proposed an ordinary-meaning rule. Whereas the old plain-meaning rule meant, in essence, that the court had to stick to apparent textual meaning only in circumstances where, say, the meaning was 90/10 one direction, it would seem to be enough under the ordinary-meaning approach that the meaning is 60/40, or even 55/45, in one direction to bind the court to that meaning, at least absent an “established canon” pointing in another direction. For Justice Scalia, ambiguity is ordinarily not the key—and yet it became the key to liberate him from the apparent meaning of the key statutory words in the *BFP* case. How are lower courts and practitioners to divine when “ambiguity” is a safety valve liberating judges and when ordinary meaning is binding?

The more candid move in Justice Scalia’s opinion in *BFP* was canonical, not textual. Recall that the second part of his method asks whether the ordinary meaning of statutory text runs afoul of any *established* canon of statutory interpretation.<sup>54</sup> What Justice Scalia did in *BFP* was inconsistent with this piece of his announced approach as well, for he expanded a new canon of statutory interpretation to bend the result in his direction. Three years before *BFP*, in *Gregory v. Ashcroft*, the Court had created a clear statement rule providing that, when Congress uses its power to regulate commerce in a fashion that may regulate the state governments, the statute will not be read as intruding upon core state functions unless it contains unmistakably clear text to that effect.<sup>55</sup> Justice Scalia took this brand new canon, which itself applied only to protect state governments from arguably officious federal intermeddling, and seemingly modified it in *BFP* to apply to federal preemption of core aspects of the local police power regulating private citizens, such as the state property laws.<sup>56</sup> Because neither the *Gregory* canon nor its *BFP* offspring was an “established” canon, it is inescapable that the creation of both canons was judicial lawmaking by any other name. *BFP*’s reliance on *Gregory* was a great surprise—the Ninth Circuit below had not anticipated the idea, and *Gregory* was not even cited in any of the briefs in the Supreme Court.

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53. See, e.g., *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

54. See *supra* notes 33, 52 and accompanying text.

55. 501 U.S. 452, 460-61 (1991).

56. See *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 554 & n.8 (1994).

If the promise of the new *textualism*—the text, the whole text, and nothing but the text—is that courts will stick with ordinary statutory meaning and leave the policy problems to the Congress, then *BFP* flunks. If the promise of the new *formalism*—text plus established canons—is the creation of a mechanical, predictable interpretive regime, then *BFP* flunks as well. The creation of new canons and the manipulation of old ones provide the formalist with a safety valve—a device for avoiding textual readings that she cannot abide. When this proclivity to make law through canonical technique is combined with the neat trick of selectively relying upon some ambiguity to free the court to consider other factors, one must wonder whether the new formalism is, in practice, very formalistic at all.

Let's take one more example of tension between a court of appeals and the Supreme Court. Title VII of the Civil Rights Act of 1964<sup>57</sup> outlaws discrimination in employment on the basis of such factors as race or gender.<sup>58</sup> Suppose an employee is fired and, believing that the discharge was racially motivated, files a complaint with the federal Equal Employment Opportunity Commission, the first step in bringing a Title VII action. Suppose further that, while the charge is pending, the former employee seeks another job. If the former employer gives the former employee a negative job reference in retaliation for his or her filing of the complaint with the EEOC, is that actionable under Title VII?

Title VII's anti-retaliation provision states that it is unlawful "for an employer to discriminate against any of his employees or applicants for employment" who have availed themselves of the statute's protections.<sup>59</sup> In my hypothetical situation, the former employee is not an "employee" at the time the retaliation allegedly occurred. Nor could he possibly be considered an "applicant for employment" to his former employer. On the face of the statute, Title VII does not protect him. But that is just stupid. "Retaliation" is exactly what the former employer has done, and the former employer's conduct is precisely that which the statute was designed to prevent.

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57. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

58. See *id.* § 2000e-2.

59. *Id.* § 2000e-3(a).

A case of this kind, *Robinson v. Shell Oil Co.*,<sup>60</sup> divided the United States Court of Appeals for the Fourth Circuit sitting en banc. Seven judges followed the plain meaning and denied relief; four dissented. The majority concluded that the statute unambiguously failed to protect former employees from retaliation.<sup>61</sup> Indeed, the statute defines "employee" as "an individual employed by an employer,"<sup>62</sup> and there was no doubt that, at the time of the alleged retaliation, this person was not employed by that employer. The majority said that they were "simply prohibited from reading into the clear language of the definition of 'employee' that which Congress did not include."<sup>63</sup> The majority acknowledged that most of the courts of appeals had gone the other way on this question, avoiding a literal interpretation because that produced a result defeating the underlying purposes of Title VII.<sup>64</sup> This purposive approach—consistent with the critical pragmatism I endorsed earlier—came under heavy fire from the Fourth Circuit majority, which called it an abandonment of "the established analytical framework for statutory construction" in pursuit of a reliance "on broad considerations of policy."<sup>65</sup> The majority stated that "these decisions fail to heed the Supreme Court's repeated mandate" to follow ordinary statutory textual meaning, citing a Supreme Court opinion written by Justice Thomas that is very Scalia-like in its analysis.<sup>66</sup> The majority concluded that, "[a]lthough extending Title VII to cover former employees is tantalizing fruit, our judicial inquiry must cease when the language of a statute is plain and unambiguous. *Such is the rule of law.*"<sup>67</sup>

When the Supreme Court granted review in *Robinson*, I was delighted. Now was the time to find out if there are five or more pragmatists left on the Court. If so, it seemed that Justice Scalia would have fun in his dissent, chiding them along the lines of "such is the rule of law."

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60. 70 F.3d 325 (4th Cir. 1995) (en banc), *rev'd*, 519 U.S. 337 (1997).

61. *See id.* at 329-30.

62. 42 U.S.C. § 2000e(f).

63. *Robinson*, 70 F.3d at 330.

64. *See id.* at 331-32.

65. *Id.* at 332.

66. *Id.* (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

67. *Id.* (emphasis added).



I was quite surprised when the Supreme Court reversed unanimously—in an opinion by Justice Thomas!<sup>68</sup> You have to wonder if the judges in the majority of the Fourth Circuit felt that they had been victimized by a bait and switch. Justice Thomas concluded that “employee” was ambiguous in Title VII—it could mean former employees as well as current ones.<sup>69</sup> After all, the definition of an employee is someone “employed by an employer,”<sup>70</sup> which could be “is employed” or “was employed,” Justice Thomas wrote, and without a verb derived from the infinitive “to be” preceding the verb “employed,” the statute is ambiguous.<sup>71</sup> Some provisions of Title VII seem to assume that “employee” means former employees, while others do not.<sup>72</sup> This broader statutory context, along with “a primary purpose of [the] antiretaliation provisions: [m]aintaining unfettered access to statutory remedial mechanisms,”<sup>73</sup> supported an interpretation protecting former employees as well as current employees and applicants for employment.

I entirely agree with the outcome in this case, as well as with much of its rationale. To get to this outcome, however, Justice Thomas had to posit that the Court was free to roam around the rest of the statute and consider broad statutory purposes, so long as the provision in question did not have a strictly unambiguous meaning. Again, the limiting device proposed by Justice Scalia—courts must stick to “ordinary meaning” even when there is no plain meaning—failed to work itself into a Supreme Court opinion that Justice Scalia himself joined. In this light, even if the majority of the Fourth Circuit was wrong to conclude that the definition of “employee” was completely unambiguous, were they not right that the definition had an ordinary meaning excluding former employees? Justice Thomas worked hard to create enough doubt on the question of ambiguity to allow him to peek outside the provision at broader considerations. At that point, the case became an exercise in pragmatism, and an easy one at that.

*Robinson* suggests that, like beauty, ambiguity is in the eye of the beholder. In *Robinson* ambiguity becomes a magi-

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68. See *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

69. See *id.* at 340-45.

70. *Id.* at 342 (quoting 42 U.S.C. § 2000e(f) (1994)).

71. *Id.* (emphases in original).

72. See *id.* at 343.

73. *Id.* at 346.

cally liberating factor, a beautiful thing for judges—even if, or one might say, especially if, it is selectively employed.

What might courts of appeals judges make of *BFP* and *Robinson*? I have some suggestions. When “broader considerations” counsel a deviation from plain statutory language, as the Ninth Circuit thought in *BFP*, *do not* write the opinion in anti-formalist fashion, balancing textual, institutional, and contextual factors to reach a pragmatic result. No, you will be accused of abusing the judicial role. Instead, reach your pragmatic result by the formalist path of enveloping those broader considerations into a new canon of interpretation (or better yet, reformulate an existing canon to suit your needs, so it looks even less like you are lawmaking into the teeth of statutory text). When you do that, cite *BFP* and its predecessor, *Gregory v. Ashcroft*, in support. If you have problems with plain statutory text that canonical manipulation cannot somehow solve, find some way that the text is not one hundred percent unambiguous—to paraphrase an old hair tonic commercial, just a little doubt will do ya—to free up your license to rely on broad statutory purposes. When you do this, cite *Robinson* in support.

More seriously, is there really any doubt that the results in both *BFP* and *Robinson* are driven by antiformalist considerations? Would it not be appropriate to promote more judicial candor in acknowledging that, rather than hiding behind canons of interpretation and artificial exercises in ambiguity-hunting? I think the judges on the courts of appeals might appreciate this, for it might eliminate more bait and switch jobs, like *Robinson*, in the future.

Even if the courts of appeals and the Supreme Court are not in synch on these issues of interpretation, one would hope that the Court’s recent increased focus on formalist methodology at least would create some greater consistency in the Court’s own work. One would expect the greatest consistency in related cases concerning the same statute. It has not always worked out that way, however, as in three related criminal cases that, in the interests of brevity, I will analyze quickly.

A federal statute provides that “[w]hoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be

sentenced to imprisonment for five years . . . .<sup>74</sup> The magic language here is “uses or carries a firearm.” Suppose someone trades a gun for some drugs. Does that trigger the five-year mandatory sentence on top of the sentence for the drug offense? Yes, the Court said in the first of these cases, in an opinion by Justice O’Connor.<sup>75</sup> Trading the gun for drugs was certainly “using” the gun in relation to a drug offense, she said, citing dictionary definitions defining “use” as “to employ.”<sup>76</sup> Justice Scalia dissented, contending that the ordinary meaning of “uses a firearm” is using a gun as a gun, not as a medium of exchange like money.<sup>77</sup>

What if both a gun and drugs are found in a vehicle—should the defendant receive the mandatory sentence on top of the drug sentence? In the second case, which dealt with this situation, the Court unanimously rejected the argument that the defendant had “used” the gun.<sup>78</sup> Justice O’Connor wrote that the statute required an active use—I guess, like trading the gun for drugs—rather than the passive employment of the gun in this circumstance.<sup>79</sup> But in a third case essentially identical in facts to the second case, a bare majority of the Court accepted a different theory, that the gun had been “carried” in relation to a drug offense.<sup>80</sup> Recall that the statute provided the extra penalty for someone who “uses or carries a firearm” in relation to the drug offense.<sup>81</sup> The majority opinion by Justice Breyer was joined by Justices Stevens, O’Connor, Kennedy, and Thomas; the dissenting opinion by Justice Ginsburg was joined by Chief Justice Rehnquist, Justice Scalia, and Justice Souter. This is a weird and, so far as I know, unprecedented lineup of Justices on both sides of a question.

Justice Breyer, who is not much of a formalist, began the substantive part of his opinion with hyperformalism, stressing dictionary definitions of “carry” as simply meaning conveying something, and to this effect he also marshaled quotations from the Bible, Defoe’s *Robinson Crusoe*, Melville’s *Moby Dick*, and

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74. 18 U.S.C. § 924(c)(1) (1994).

75. See *Smith v. United States*, 508 U.S. 223 (1993).

76. *Id.* at 229.

77. *Id.* at 241-43 (Scalia, J., dissenting).

78. See *Bailey v. United States*, 516 U.S. 137 (1995).

79. See *id.* at 142-50.

80. See *Muscarello v. United States*, 524 U.S. 125 (1998).

81. 18 U.S.C. § 924(c)(1) (1994).

numerous newspaper articles.<sup>82</sup> In dissent, Justice Ginsburg contended that “carrying a gun” means “bearing [it] in such manner as to be ready for use as a weapon[]”<sup>83</sup> or, more colloquially, “pack[ing] heat,”<sup>84</sup> not putting it in the trunk of your car. She responded to Justice Breyer by citing her own dictionary definitions and biblical passages for this narrower definition of “carry” as meaning carrying an object in one’s hand or on one’s person.<sup>85</sup> She also counter-punched from the literary perspective—quoting poetry from Oliver Goldsmith and Rudyard Kipling<sup>86</sup>—the political perspective—recalling Teddy Roosevelt’s famous advice to speak softly and carry a big stick<sup>87</sup>—and the popular-entertainment perspective—quoting Benjamin Franklin (Hawkeye) Pierce, played by Alan Alda on the popular television series *M\*A\*S\*H*, as follows:

I will not carry a gun. . . . I’ll carry your books, I’ll carry a torch, I’ll carry a tune, I’ll carry on, carry over, carry forward, Cary Grant, cash and carry, carry me back to Old Virginia, I’ll even “hari-kari” if you show me how, but I will not carry a gun!<sup>88</sup>

Again, Justice Scalia, who joined Justice Ginsburg’s dissent, stuck to his view that the ordinary meaning of the key statutory term was narrow enough to allow the criminal defendant to escape liability. I applaud this sensible interpretation, especially in light of the longstanding canon of statutory interpretation counseling that ambiguities in criminal statutes are construed in favor of the defendant.<sup>89</sup> My agreement is largely

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82. See *Muscarello*, 524 U.S. at 127-32.

83. *Id.* at 140 (Ginsburg, J., joined by Rehnquist, C.J., Scalia & Souter, JJ., dissenting).

84. *Id.* at 145 (quoting *United States v. Foster*, 133 F.3d 704, 707 (9th Cir. 1998) (en banc), *vacated*, 119 S. Ct. 32 (1998) (mem.)).

85. See *id.* at 143.

86. See *id.* at 143-44.

87. See *id.* at 144.

88. *Id.* at 144 n.6 (omissions in original) (relying on an internet web site). She also quoted Charles Bronson’s character in the film *The Magnificent Seven* in the same footnote. See *id.*

89. The majority and dissenting opinions in *Muscarello* provide excellent examples of the manipulability of this canon. For the majority, Justice Breyer articulated an exceedingly narrow rule of lenity that is triggered “only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended.” *Id.* at 138 (multiple quotation marks omitted) (quoting *United States v. Wells*, 519 U.S. 482, 499 (1997)). Unsurprisingly, Justice Ginsburg’s dissent asserted a more aggressive formulation of the rule of lenity, contending that “where text, structure, and history fail to establish that the Government’s position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant’s] favor.”

based on the proposition that the language of the statute is not very clear and that the policy bases for the canon of narrow construction—ensuring fair notice to criminal defendants, limiting prosecutorial discretion, limiting the reach of the federal criminal law over what are also state crimes—strike me as legitimate legal-process concerns of pragmatic importance in this context. It certainly seems more useful than artificial searches for objective meaning by rooting around in dictionaries, Bartlett's *Familiar Quotations*, and on-line newspaper sources.

If the Court cannot achieve coherence in a line of cases involving the same statute, it is even less likely to attain coherence across a field of law over time. In this respect, because of time constraints, I will only briefly mention the field I study the most—federal Indian law.<sup>90</sup> A series of cases had suggested that Indian tribal sovereignty survives to this day and can be abrogated only by a clear congressional command. This approach attempted to make Congress take colonization seriously. It was designed to serve the values of predictability, certainty, and limiting judicial discretion, which are central to Justice Scalia's formalism.

In recent years, the Supreme Court has seemingly replaced this approach with an ad hoc balancing test, under which tribal assertions of sovereignty are measured against whatever other interests might be present in the case. We need not merely speculate that this is a kind of legal dynamism that Justice Scalia would condemn. The collected papers of Justice Thurgood Marshall, available at the Library of Congress, demonstrate that Justice Scalia has concerns about this evolution of legal doctrine in an antiformalist direction.<sup>91</sup> In a 1990 case in

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*Id.* at 148 (alterations in original) (quoting *United States v. Granderson*, 511 U.S. 39, 54 (1994)). That both Justices could find such diverse quotations from precedent on the effect of the rule of lenity suggests that the Court has no consistent approach to resolving criminal liability under less than certain statutory provisions. See generally Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345.

90. Here I borrow from my analysis in Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. (forthcoming Oct. 1999).

91. See Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr. (Apr. 4, 1990) (*Duro v. Reina*, No. 88-6546), in *The Papers of Thurgood Marshall* (reproduced from the collections of the Library of Congress, on file with author). I thank David Getches for a copy of this memorandum, which he discussed in David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1575 (1996).

which the majority voted that a tribe lacked criminal jurisdiction over a nonmember even though Congress had never abrogated it,<sup>92</sup> apparently Justice Scalia originally expressed an inclination to go along with the dissenting views of Justices Brennan and Marshall. Brennan assigned Scalia the dissenting opinion. After working on it for awhile, Scalia finally gave up and switched sides. In a short memorandum to Brennan apologizing for doing this, Scalia said the recent "opinions in this field have not posited an original state of affairs that can subsequently be altered only by explicit legislation, but have rather sought to discern *what the current state of affairs ought to be* by taking into account all legislation, and the congressional 'expectations' that it reflects, down to the present day."<sup>93</sup> Justice Scalia explained that "I would not have taken that approach as an original matter, but it seems too deeply imbedded in our jurisprudence to be changed at this stage."<sup>94</sup>

This is a remarkable admission of deference to the anti-formalist jurisprudential status quo for a Justice who continues to refuse to join any majority opinion that even cites legislative history,<sup>95</sup> now almost a decade after a majority opinion stating that the majority would continue to rely on legislative history if it darned well wanted to, thank you very much.<sup>96</sup> It lends itself to the hypothesis that some things are worth fighting about, like the use of legislative history, and others are not, like the continuation of meaningful Indian tribal sovereignty.

The examples that I have given suggest that, as a descriptive matter, the Supreme Court continues to consider antiformalist as well as formalist factors in interpreting statutes, and that as a normative matter, the appropriate criticism is not to condemn the pragmatic exercise in the name of formalism (Justice Scalia's preferred critique), but instead to insist upon a critical pragmatism that candidly exposes what the court is doing and why it is doing it.<sup>97</sup> For example, my concern about the Court's recent drift in federal Indian law is not that it con-

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92. See *Duro v. Reina*, 495 U.S. 676, 684-92 (1990).

93. Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr., *supra* note 91 (emphasis added).

94. *Id.*

95. See *supra* note 31 and accompanying text.

96. See *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991) (positing that the Court's well-established practice of using legislative history in statutory construction "will . . . reach well into the future").

97. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 199-204 (1994); Eskridge, *supra* note 37, at 1556-60.

siders antiformalist factors, but that it has done so in a one-sided way that lacks candor about what it is up to and why it is doing it.<sup>98</sup> That kind of uncritical pragmatism is just as bad, in its own way, as hyperformalism. The uncritical pragmatist privileges a limited, even biased perception of life to the exclusion of meaning derived from formal legal sources and from a more nuanced appreciation of the complexities of life in a diverse, pluralistic society. The hyperformalist defers to a frequently artificially determinate formal legal meaning without critically testing it against the broader purposes of a legal regime, which are to foster a functioning society.<sup>99</sup>

The debate between formalism and antiformalism lies at the root of American jurisprudence. Judge Posner has written:

[This] jurisprudential disagreement is not less important by virtue of being unavowed by most judges. It is the disagreement between the severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures, and the natural lawyer's or legal pragmatist's view that *the practice of interpretation* and the general terms of the Constitution (such as "equal protection of the laws") authorize judges to enrich positive law with the moral values and practical concerns of civilized society. . . . Neither approach is entirely satisfactory. The first buys political neutrality and a type of objectivity at the price of substantive injustice, while the second buys justice in the individual case at the price of considerable uncertainty and, not infrequently, judicial willfulness. It is no wonder that our legal system oscillates between the approaches.<sup>100</sup>

It is our quest to live in a just society under the rule of law that causes these oscillations. My view is that no sharp disjunction can be legislated between law and life, between judge and context, between neutrality and value. Law without life is no more functional to a thriving society than would be life without law.

I can think of no more fitting way to end this lecture than to suggest that the two outstanding lecturers I identified at the outset would join me on the pragmatic side of this debate. Emerson was a bit of a political reformer, while Younger was more concerned with preserving the beauty of what existed, but both

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98. See Frickey, *supra* note 90.

99. See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 102 (William N. Eskridge & Philip P. Frickey eds., 1994).

100. *United States v. Marshall*, 908 F.2d 1312, 1334-35 (7th Cir. 1990) (en banc) (Posner, J., dissenting) (emphasis added), *aff'd sub nom.* *Chapman v. United States*, 500 U.S. 453 (1991).

would have laughed, I think, at the notion that formalist rules can, much less should, purge considerations of life from our thought processes.

Emerson was asked to address the graduating class of the Harvard Divinity School in 1838.<sup>101</sup> At a time when the Harvard Divinity School was still very much concerned with traditional notions of divinity, he chose a subversive theme for the lecture. He contrasted historical religion, which he castigated as a dead body of formalisms, with living religion, which he viewed as seeking to uncover truths revealed through the experiences of life. He stated:

Whenever the pulpit is usurped by a formalist, then is the worshipper defrauded and disconsolate. . . . I once heard a preacher who sorely tempted me to say, I would go to church no more. . . . A snowstorm was falling around us. The snowstorm was real; the preacher merely spectral; and the eye felt the sad contrast in looking at him, and then out of the window behind him, into the beautiful meteor of the snow. He had lived in vain. He had no one word intimating that he had laughed or wept, was married or in love, had been commended, or cheated, or chagrined. If he had ever lived and acted, we were none the wiser for it. The capital secret of his profession, namely, to convert life into truth, he had not learned. Not one fact in all his experience, had he yet imported into his doctrine. This man had ploughed, and planted, and talked, and bought, and sold; he had read books; he had eaten and drunken; his head aches; his heart throbs; he smiles and suffers; yet was there not a surmise, a hint, in all the discourse, that he had ever lived at all. Not a line did he draw out of real history. The true preacher can be known by this, that he deals out to the people his life,—*life passed through the fire of thought*. But of the bad preacher, it could not be told from his sermon, what age of the world he fell in; whether he had a father or a child; whether he was a freeholder or a pauper; whether he was a citizen or a countryman; or any other fact of his biography.

It seemed strange that the people should come to church. It seemed as if their houses were very unentertaining, that they should prefer this thoughtless clamor.<sup>102</sup>

It is a tribute to the power of formalism that Emerson was immediately condemned for this lecture and was not invited back to Harvard for over thirty years.

Compare Younger's advice on the importance of bringing life to legal writing:

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101. See Ralph Waldo Emerson, *The Divinity School Address*, in 1 THE COLLECTED WORKS OF RALPH WALDO EMERSON 71, 72 (Alfred R. Ferguson et al. eds., 1971).

102. *Id.* at 85-86 (emphasis added).



You must see through and around your subject, measuring it by more than one measuring stick, turning it over, testing it, arriving at a just and clear-headed assessment of its position in the hierarchy of things.

The word that best expresses this requisite distance is "detachment," understood as a certain amusement with the enterprise upon which you are engaged, a sense of humor about yourself and your works. If a lawyer has it, the lawyer's writing will unfailingly communicate the play of intelligence ("play" here being as important as "intelligence").<sup>103</sup>

Younger urged lawyers and judges to assess issues through multiple lenses for their position in the hierarchy of the *multiplicity* of things, not just as against one big thing—a quintessentially pragmatic technique. The Emersonian preacher's task is to speak of *life passed through the fire of thought*; the gifted legal analyst, Younger suggested, brings the fire of thought to law fused with life.

It is a shame that the students in this law school will never have the privilege of learning from Irving Younger. Among his many legacies, the one I wish to leave you with is this: strive for the play of intelligence, with "play" being as important as "intelligence." If you do this, Irving would be proud. Bring the play of intelligence to the project of statutory interpretation. If you do that, I will be proud, for it will reveal that our law school has succeeded in conveying to you the practical significance of revisiting the revival of theory in statutory interpretation.

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103. Irving Younger, *Let's Get Serious*, A.B.A. J., May 1, 1987, at 110.